No 14037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased, *Appellee.*

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Idaho Central Division

HONORABLE CHASE A. CLARK
United States District Judge

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TABLE OF CASES

APPELLEE'S AUTHORITIES — DISTINGUISHED

APPELLANT'S AUTHORITY

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REPLY BRIEF OF APPELLANT

Appellant will reply to the brief of appellee in accordance with the headings therein set forth. Before doing so, however, it is deemed necessary to re-state the four grounds of alleged negligence on the part of the Railway Company which were submitted for jury determination. These grounds follow:

(1) Failure to provide A. E. Mely a safe place to work;

10) Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged;

(11) Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision;

(12) Failing to properly protect Train No. 1648 while it was in such obscure position aforesaid, and in failing to protect Train No. 6015 from colliding therewith by notice, signal, warning, flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track.

This necessity arises because appellee has injected into this appeal issues which were never for jury determination, either as made by the pleadings or the evidence in the case. These false issues will be pointed out in the discussion of the headings above referred to.

FACTUAL OUTLINE

Under this heading it is said:

> "* * * Train 6015 East was then being operated under *special* train orders issued by the Train Dispatcher located at East Lewiston, Idaho." (Appellee's Brief, p. 1.) (Italics supplied.)

It is not pointed out wherein this train order, which

appears on page 2 of Appellee's Brief, was *special* in its nature. This order merely instructed that this train be run from East Lewiston *to* Arrow, and not *through* Arrow. On page 3 is found this language:

> "There was a dispatcher at East Lewiston (R. 79) and a station agent at Arrow station (R. 47), who could have phoned and determined that train 6015 East was running extra to Arrow Station. (R. 167-168.)"

The Railway Company was not charged specifically with negligence because of the failure of the dispatcher at East Lewiston to have advised the respective crews of the two trains as to the whereabouts of each at different times or places, or at all; neither was the Railway Company specifically charged with negligence because of the failure of the agent at Arrow to have made the telephone call above referred to in the excerpt.

Again on page 3 is found this language:

> "There were no block signals on this track."

In this connection reference is made to sub-division 9 of paragraph V of the complaint, wherein the grounds of alleged negligence are set forth:

> "Failure to provide and equip its railroad system at the place of collision with a signal block

> system to warn plaintiff's decedent of the voluntary obstruction ahead, as herein alleged." (R. 7.)

This charge of negligence was withdrawn from jury consideration. (R. 181.) The inquiry naturally arises why does counsel for appellee characterize it as a fact for consideration by this Court? On page 4 of Appellee's Brief it is said:

> "It took Engineer Mely six minutes to travel 3.1 miles, or an average speed of about thirty miles per hour. He was not traveling within yard limits the full route, and, therefore, may have exceeded a speed of thirty miles per hour *outside* yard limits." (Italics supplied.)

The inference to be drawn from this language is that counsel for appellee desires this Court to understand that within yard limits Mely was operating this train at 30 miles per hour or less. The undisputed evidence is that 1300 feet from the point of collision and within yard limits Engineer Mely was operating his train at a speed of 47 miles per hour. (R. 227.) (Defts. Ex. 27, Speed Tape on Engine No. 6015.) This speed of 47 miles per hour was maintained until Engineer Mely dynamited the train when the caboose of No. 1648 first came into his line of vision, at which time he was 980.3 feet westerly thereof. (R. 188.)

COMMENTS ON APPELLANT'S STATEMENT OF CASE

(Appellee's Brief, Page 5)

"On page 5 of appellant's brief it is asserted that certain material facts are undisputed. We draw to the Court's attention the fact that there is a dispute as to whether or not train number 6015 was being operated at restricted speed prior to the collision, and this regardless of the speed tape on engine number 6015. The fireman of engine 6015, Frank A. Reisenbigler, testified as follows:

> 'Q. Was there anything unusual in the speed of that train that drew your attention to the speed?
>
> A. No, sir.' (R. 79.)

"The brakeman of train 6015, A. G. Ferris, testified as follows:

> 'Q. Was there anything unusual in the speed of the train that you noticed?
>
> A. Not that I noticed, or was conscious of, no, sir.' " (R. 106.)

Despite the fact that the operating rule required Engineer Mely to proceed at restricted speed, despite the fact that he jumped from the locomotive in an attempt to save his life after he had discovered the train, despite the fact that after the train had been dynamited it traveled 980.3 feet and crashed into the

rear of the caboose of No. 1648, counsel would have this Court believe that there was a factual dispute as to whether or not the train was being operated at restricted speed.

OPERATING RULES AND GENERAL INSTRUCTIONS

(Ex. 24; R. 154)

(Appellee's Brief, p. 6)

Under this heading we find one of the false issues injected into this appeal: Counsel for appellee would have this Court believe that No. 6015 was a "train of superior right," as that phrase is used in the book of rules. (Ex. 24, p. 6.)

In appellant's opening brief it has already been pointed out that No. 6015 was an *extra train,* viz., a train not authorized by a time table schedule. A train of superior right is "a train given precedence by a train order." (Ex. 24; p. 6.) Undoubtedly counsel wishes this Court to believe that Train No. 6015 was *superior* to Train No. 1648, also an extra train. The fact is that these were trains of equal classification. No. 1648 had just as much right to engage in switching operations within yard limits as No. 6015 had a right to proceed within yard limits. That No. 6015 was not superior to No. 1648 is shown by the following definition in the book of rules:

"Train of Superior Class.—A train given precedence by time table." (Ex. 24, p. 7.)

It was not seen fit in Appellee's Brief to call this definition to the Court's attention. Being an extra train, No. 6015 was not a time table train, and the same applies to No. 1648.

Reference is made by appellee to Rule S-71 with the studied intent to convince this Court that No. 6015 was a superior train. The applicability of this rule was never an issue in this case. Its alleged violation was never urged in the trial of the case. As pointed out in appellant's opening brief, the Company was charged with the violation of but three operating rules—99, 101 and 108. (R. 39.)

Under the heading above referred to appellee's counsel states:

"* * * the operating rules relied upon by appellant are not dissimilar from those construed in Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 36 S. Court, 185, 60 L. Ed. 431, wherein the reasonableness of the rules was submitted to the jury as a question of fact, and the same is true of the following rules involved in Southern Ry. Co. v. Craig (4 Cir.), 113 Fed. 76."

Appellant quotes syllabus 3 of the *Wright* decision:

"Master and servant—employers' liability—negligence—rules.

"3. The running of a switching engine on the main track through a deep and curved cut within the yard limits at such a rate of speed as to endanger the safety of an 'extra' which the switching crew knows may be coming through the cut on the same track is actionable negligence under the Federal employers' liability act of April 22, 1908 (35 Stat. at 65, chap. 149, Comp. Stat. 1913, sec. 8657) whether permitted by the railway company's rules or not, and renders the railway company responsible for the killing of the engineer of the extra in the resulting collision.

"(For other cases see Master and Servant, II, a, in Digest Sup. Ct. 1908.)"

The rule involved in the *Wright* case was as follows:

"All except first class trains will approach, enter, and pass through the following named yards (among them being the yard at Lincoln) under full control, expecting to find the main track occupied or obstructed." "Yard limits will be indicated by yard limit boards. Within these yard limits engines may occupy main tracks, protecting themselves against over-due trains. Extra trains must protect themselves within yard limits."

It would have been more accurate for appellee's counsel to have said that the *facts* in the *Wright* case are not "dissimilar" to the facts in the case at Bar. Indeed, the engineer in charge of the switch engine

which caused the damage in the *Wright* case was in exactly the same position as Engineer Mely. In the course of the opinion in the *Wright* case Mr. Justice Van Devanter remarked:

> "The plaintiffs took the position that the rules, if regarded as devolving upon one in the intestate's situation the measure of responsibility indicated, and permitting the switching crew to run their engine through the cut, not under control, but at high speed, when they knew that they might meet the other engine, were unreasonable in that respect. Whether the rules were thus unreasonable was submitted to the jury as a question of fact over the company's objection that the question was one of law for the court. The jury found, as the record plainly shows, that the rules were unreasonable, and that the switch engine was negligently run at greater speed than was reasonable in the circumstances. Dealing with these subjects, the supreme court of the state said (96 Neb. 87, 146 N. W. 1024): 'The decedent was running his engine under full control, within the meaning of the rule of the company. There was no express rule as to the speed allowed to the switch engine. Of course, the law requires that such engine should not be run at an unreasonable rate of speed under the circumstances. The engineer of the switch engine must have had a clear view of the approaching engine for at least 420 feet, and it was run at least 370 feet of this distance before the collision occurred. It could have been stopped within a distance of 60 feet unless running at a greater speed than 20 miles an hour; and, knowing, as the crew of the switch engine did, that No. 1486 (the extra)

was in the yards, to run at a greater speed than 20 miles an hour in such a locality and under such circumstances was in itself negligence. In such a case the court might properly have told the jury that any rule of the company which permitted such action was unreasonable, and the giving of an erroneous instruction as to the reasonableness of the rules would be without prejudice to the defendant.'

"While doubting that the rules, rightly understood, permitted the switching crew to proceed at a speed which obviously endangered the safety of the extra, which they knew might be coming through the cut on the same track, we agree that if this was permitted by the rules, they were in that respect unreasonable and void. And in either case, we think it is manifest that there was ample evidence of negligence whereon the company could be held responsible under the act of Congress

"Judgment affirmed."

We are indebted to counsel for the citation of this decision. Parenthetically, it might be remarked that had counsel for appellee been employed to institute action for the death of Eddie Feehan, the conductor in charge of No. 1648, unquestionably they would have urged that Feehan's death was brought about by the negligence of Engineer Mely in operating his train within yard limits at a high and dangerous rate of speed and in violation of the rule of the company requiring its operation at restricted speed.

With reference to *Southern Railway Company vs. Craig,* 113 Fed. 76, it is sufficient to set forth syllabi 1, 2 and 3:

"1. Master and Servant—Railroad Trains—Mode of Operation—Avoiding Collisions between Trains—Ordinary Care.

"Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine. The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control. The evidence as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. *Held* that, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains.

"2. Same—Ordinary Care—Instructions.

"An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct.

"3. Same—Observance of Rules—Question for Jury.

"The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury."

On page 6 of Appellee's Brief counsel makes the bald statement that

"The Court *fully* charged on the operating rules introduced in evidence * * *"

All that the learned trial Court had to say with reference to rule violation is found in the following portion of the instructions:

"There has been introduced in evidence what is designated as Rules * * * 99, 101, 108 and other general rules read to you from the Consolidated Code of Operating Rules and General Instructions. You are advised that these rules are promulgated by the railroad companies for the safe operation of their trains and do not have the effect of law.

"You are further advised that it is for you to determine whether or not such rules are reasonable and regardless of any violation of the rules, whether the defendant was negligent in any manner and whether the negligence was the proxmate cause of the death of the deceased Mely and whether the plaintiff Tillie Mely was damaged thereby." (R. 247-248.)

The "reasonableness" of Rule 93 and the attend-

ing definition of restricted speed relied upon by appellant was never an issue in the case. Had the Court given Defendant's Requested Instruction No. 6 (R. 11) it would have at least to some extent fully charged the jury in this respect. That it was the duty of the Court so to do has been clearly demonstrated in the case of *Atchison, T. & S. F. Ry. Co. vs. Ballard,* 108 Fed. (2d) 768, cited in appellant's opening brief, page 26. The following language in that decision cannot be over-emphasized:

> "Appellant, in charge after charge, requested the court to do this, and in addition, objected to the form of the general charge. This, instead of instructing directly upon the rule, as to restricted speed, its meaning and effect, that it had been violated, and that its violation was negligence, submitted to the jury, whether or not it had been violated, and whether, if it had been, the violation was negligent. Thus, there was error in submitting an issue as to the legal effect of the violation of this rule when it was the duty of the court to direct the jury, that its violation by plaintiff would be negligence. And there was error, too, in failing to instruct the jury that on the undisputed facts, plaintiff had violated it."

Again we find counsel for appellee, on pages 6 and 7 of Appellee's Brief, referring to Rule 995 and Rule 997 with the undoubted intent of impressing upon this Court that there was evidence showing a viola-

tion of these rules. Again we must point out that their violation was not pleaded; their alleged violation was raised for the first time in Appellee's Brief. Be that as it may, appellant did comply with Rule 995 in that it did issue a train order. No evidence was introduced which could in any event bring into application Rule 997 that there existed in the vicinity of this accident

> "dangerous conditions and train movements * * *"

which required the dispatcher to guard against, nor did the dispatcher issue

> "improper or unsafe combinations in train orders."

On page 7 of Appellee's Brief this language is found:

> "The train order was an express direction for him to proceed to Arrow Station and surely caused Mely to rely upon the implied assurance that, except for opposing train 661, no other train was on the track. Mely's operation was in obedience to the train order, and the jury undoubtedly found him justified in assuming a 'clear track' with the superior right to run straight through to Arrow Station. Thus, the dispatcher's train order might be considered as a fault; it certainly contributed to the collision. Miller v. Central R. Co. of New Jersey, (2nd Cir.) 58 Fed. (2d) 635, 636."

The answer to this contention is that from the very

moment Mely entered the yard limits he was expressly bound by the provisions of Rule 93 to operate at restricted speed. He had no right to assume that there would be no train on the track ahead of him. It has been pointed out in Appellant's opening brief that No. 1648 had engaged in switching operations at Arrow Station. Mely was thoroughly familiar with these operating rules; he was an experienced engineer. In the General Operating Rules governing the conduct of employees with reference to the care required of them is found the following admonition:

> "They must expect trains to run at any time on any track in either direction." (Ex. 24, p. 6.)

Here again we have a false issue injected into this appeal, viz: that the train order was in some manner misleading. The order is clear and unambiguous; it simply instructed him to proceed to Arrow. The *Miller* case, cited in support of the appellee's contention, has not the slightest factual similarity to the case at Bar, nor is it authority for the proposition that appellant's dispatcher issued a faulty, misleading or confusing train order. The complaint in that case charged negligence on the part of the conductor in ordering the deceased engineer to proceed to a cer-

tain station without the conductor ascertaining whether there was any opposing train, thereby causing the engineer to rely upon the implied assurance that none would be met on the way. The collision in the *Miller* case did not occur within yard limits. As pointed out in appellant's opening brief, the *Miller* case is authority for its position that the sole cause of Mely's death was his disobedience of Rule 93. We invite the Court's attention to the language from the *Miller* decision quoted on page 39 of appellant's opening brief, wherein the distinction between trains operating within and without yard limits is clearly defined. Referring to the facts in the *Miller* case, the Court of Appeals of the Second Circuit used this language:

> "It seems to us that the situation involved two concurring acts of contributory negligence and was not one where the employee has disobeyed the rule and is 'primarily' responsible."

In further support of the false issue that

> "The dispatcher's train order might be considered as a fault; it certainly contributed to the collision." (Appellee's Brief, p. 7.)

appellee cites the decision of this Court in *Atchison, T. & S. F. Ry. Co. vs. Seamas,* (9th Cir.) 201 Fed. (2d) 140. We quote syllabi 5 and 6:

"5. Master and Servant. When a general order is given, an employee must use ordinary care in its execution, and the giving of the order does not affect the question whether the servant has been negligent in his manner of carrying it out, where there is a choice open to him.

"6. Master and Servant. In action under Federal Employers' Liability Act, whether plaintiff, who was knocked from car brake platform which was out of sight of foreman and engineer but to which he had climbed after being instructed by foreman to check brakes on car, knew or should have known that his choice of a manner in which to carry out the order exposed him to an unreasonable risk was question for jury. Federal Employers' Liability Act, Sec. 1, 45 U.S.C.A., Sec. 51."

What appellee overlooks is that in the *Seamas* case the injured party complied with a general order given to him by his superior, while in the instant case Mely was acting in violation of a special rule promulgated for his own safety. Also on page 7 of Appellee's Brief is found this language:

"The jury could consider that defendant was negligent when its dispatcher sent both crews in the same direction on a single track without telling them specifically of the presence of the other. Williams v. Reading Co., 99 Fed. Supp. 960, 962."

Denying the motion of defendant railway company for judgment n.o.v. in the cited case, District Judge

Clary (U. S. Dist. Ct., E. D. Penn.) used the following language:

> "The jury was free to believe that the defendant was negligent in failing to provide a safe place to work, i.e. it could have found that the road bed was weak and that condition caused the plaintiff to slip. It is possible, under the evidence, for the jury to have found that plaintiff did not look and that if he had looked he would have seen a train in the distance, but that, absent the weak road bed, he would have negotiated the crossing safely. This would certainly make the plaintiff guilty of contributory negligence, but it leaves to the jury the question of defendant's negligence in permitting a condition to exist which caused plaintiff to slip and place him in the position of danger. There is a further point the jury might have considered, that defendant was negligent in that the foreman, with specific knowledge that a train was due on Number 4 track, sent plaintiff out on an assignment requiring him to cross the Number 4 track without telling him specifically that a train was due momentarily on that track."

In connection with the alleged negligence of the dispatcher above referred to, we assume that he would have discharged his full duty if he had added to the train order the following language:

> "Extra 1648 is stationary on line at Arrow."

What then? Engineer Mely would have entered the yard limits at *restricted speed.* In this connection

how apt is the language of Mr. Justice Holmes in *Unadilla Valley Ry. Co. vs. Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, referred to and quoted from at pages 39, 40 and 41 in appellant's opening brief:

> "Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. *The message would only have given him another motive for obeying the rule that he was bound to obey.*"

PREFACE

(Appellee's Brief, p. 8)

The writer of this brief has not had occasion to read "Beyond the High Himalayas" by Justice William O. Douglas. Suffice it to say that the "event" in the case at Bar was the death of Engineer Mely; "the cause of that event" was the violation of Rule 93.

APPELLATE REVIEW

(Appellee's Brief, p. 8)

This heading is simply an academic discussion. Appellant has no quarrel with the general principles of law announced in the cases cited.

With reference to Rule 61 of the Federal Rules of Civil Procedure (harmless error), it is asserted that the errors specified in the appellant's opening brief were particularly harmful to appellant. The action of the trial Court in denying the motion for judgment n.o.v. or in the alternative for a new trial was "inconsistent with substantial justice."

COMPARATIVE NEGLIGENCE RULE

(Appellee's Brief, p. 10)

Appellant is at a loss to understand why appellee labors the "assumption of risk" doctrine and the fact that it was "swept into discard with the adoption of the 1939 amendment to the act * * *"

As this learned Court well knows, prior to the 1939 amendment assumption of risk was a defense that had to be affirmatively pleaded. Appellant did not stultify itself by urging it as a defense in the trial of the case; it contented itself with endeavoring to establish that the sole and efficient cause of Mely's death was his violation of an operating rule. We confidently assert, however, that there was one risk that Mely did assume, viz: the risk that arose out of his own negligence.

STATUTORY LAW

(Appellee's Brief, p. 11)

No comment.

ARGUMENT

(Appellee's Brief, p. 12)

Under this heading appellee asserts that the cases cited by appellant in its opening brief

> "are the type of cases which were swept into discard with the adoption of the 1939 amendment to the Federal Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; 87 L. Ed. 610."

Again counsel raises the ghost of assumption of risk. In none of the opinions handed down since the 1939 amendment to the Federal Act have the Courts ever relieved a plaintiff under that Act from the imperative duty of establishing actionable negligence before a recovery can be had thereunder. The Federal Employers' Liability Act has not as yet by judicial pronouncement become a workmen's compensation act.

NEGLIGENCE

(Appellee's Brief, p. 15)

Appellee again refers to the absence of an automatic block signal. It graciously conceded that

> "* * * the railroad was not negligent in failing to provide a block signal system."

The argument is made, however, that by virtue of its absence the jury was not prevented from holding the railroad to a greater degree of caution than if the system had been blocked.

Under this heading it is urged that a jury question was presented on the failure of the appellant to furnish a safe place to work. This could only refer to the failure of the dispatcher at East Lewiston to have given the information to the respective train crews heretofore referred to. On page 17 of Appellee's Brief it is said:

> "It was the duty of the defendant company to the crew members of both trains to take reasonable care and precaution to prevent trains on this single railroad track from colliding and to exercise reasonable care to notify or cause to be notified the operatives of both trains of the presence of the other train, and to give such orders as would acquaint the crew members with the conditions and circumstances then and there presented. *Northern Pacific Ry. Co. v. Mix,* (9th Cir.) 121 Fed. 476, 481."

Syllabus 5 in the *Mix* case is enlightening:

> "The rules of a railroad directing the action of the train dispatcher are prima facie evidence of what is due care on his part and a violation thereof is prima facie evidence of negligence."

The following excerpt from the opinion of this Court in the *Mix* case is sufficient to indicate how hard pressed is appellee for authority:

> "The objection that the complaint does not charge the defendant company with any negligence is without merit. It charges that the defendant sent the plaintiff, as brakeman on one of its trains, along its single track and negligently omitted to give the plaintiff or any of the crew operating with him notice that it was at the same time sending another train in the opposite direction on the same track, which trains must necessarily meet within a very short time, and without making any provision for either train to take a siding. That is a sufficient averment of negligence."

Again on page 17 it is said:

> "It is alleged in plaintiff's complaint (R. 5), that engine 6015 had the right of way and was a through train and the Court so instructed in regard to the allegations of the complaint. (R. 238-239) * * *"

This allegation was denied in defendant's answer. (R. 10, Par. 2.) It is true that the Court instructed the jury with reference to this allegation. It is likewise true that the Court instructed that the defendant had denied it. It is also true that no evidence was introduced by plaintiff to sustain this allegation.

On page 18 of Appellee's Brief it is said:

> "Appellant further claims (App. Br., p. 24) that the failure to furnish a safe place to work applied or refers only to defective train equipment or right of way conditions, but the failure to furnish a safe place to work refers also to the negligence of any officer, agent, or employee. Denny v. Montour, 101 Fed. Supp. 735, and cases therein cited."

Appellee distorts the language of Appellant's Brief. What was said was this:

> "As to the *alleged* failure of the appellant company to furnish the deceased with a safe place to work, suffice it to say that this could only refer to defective train equipment or right of way conditions." (Appellant's opening brief, p. 24.)

The *Montour* case cited by appellee contains this language:

> "Plaintiff believed it was his responsibility under the rules and regulations which governed his duties to protect the property of the company and he endeavored to open the angle cock, which was a mechanical contraption on the last car, which by opening would have caused an emergency stop. Difficulty arose with this piece of equipment and as a result thereof due to the failure of the equipment to work and the failure of the engineer to stop the train after due notice had been given, plaintiff was pinned between the two cars.
>
> "Plaintiff had reasonable cause to believe the engineer would stop the train.

"It is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save the property of the railroad from harm and damage. Re-statement of the Law, Torts, Sec. 472.

"Whether or not the actions of plaintiff amounted to contributory negligence in view of the circumstances was for the jury.

"There was ample evidence to require submission to the jury the question of whether or not the negligence of the engineer in failing to promptly heed the signal and to bring the train to a prompt stop, coupled with the failure of the emergency valve to work properly, which factors combined to make the place where plaintiff was working unsafe, in whole or in part caused plaintiff's injury.

"It is not unreasonable to conclude that the conditions under which the plaintiff was required to do his work and the manner in which his fellow employees performed the responsibilities of their assignment constituted an unsafe and dangerous working place and that such conditions were a proximate cause of the accident in whole or in part.

"Furthermore, there is evidence in the record to show that the defendant did not provide reasonably safe appliances with which to work which was a proximate cause of the accident."

ANSWER TO SPECIFICATION OF ERROR NO. 2

(Appellee's Brief, p. 19)

What has heretofore been said establishes that the

verdict and judgment were clearly contrary to the weight of the evidence. It is asserted that the evidence clearly establishes that Mely's negligence was the sole and proximate cause of his death within the meaning of the decisions cited in Appellee's Brief.

ANSWER TO SPECIFICATION OF ERROR NO 4

(Appellee's Brief, p. 20)

Under this heading appellee takes the position that Appellant's requested Instruction No. 6 was properly refused because:

> "it directed the jury's attention to the fact that Extra 6015 East was an inferior train, whereas, under the train order directing Engineer Mely to proceed to Arrow Station, and the Company rules making it a train of superior right, the jury had ample grounds to determine if protection should have been given as prescribed by Company Rule 99 introduced by appellee, and, furthermore, failure of the train dispatcher to impart notice or knowledge to the crew of 6015 that 1648 was ahead, stands uncontradicted, as likewise was the dispatcher's failure to notify the crew of 1648 that train 6015 was following."

The contention that Train 6015 was a train of "superior right" is a pure figment of the imagination of counsel for appellee. Appellant asserts that it has already shown that Trains 6015 and 1648 were trains

of equal classification. They were both extra trains; they were not running in opposite directions; both were eastbound trains out of East Lewiston, Idaho. Appellant feels that with propriety the excerpt from Appellee's Brief above quoted is garbled language.

The assertion that the jury had ample grounds for determining if Rule 99 had been violated is utterly without factual foundation. It has already been pointed out that Rule 99 refers to operation of trains outside of yard limits.

The jury in this case did not determine that the failure of the dispatcher to notify the train crews was in and of itself negligence. On the contrary, as shown by the affidavits of eleven jurors filed in support of the motion for a new trial, they acted under the mistaken assumption that there was a specific operating rule of the company that required the dispatcher to give such notice. (R. 18 et seq.) Furthermore, not one qualified witness was called to establish the fact, if it were a fact, that safe, careful and proper railroading required the dispatcher to give such notice even in the absence of a specific operating rule.

Counsel for appellee wrestle mightly in an attempt

to circumvent the opinion of the Fifth Circuit Court of Appeals in *Atchison, T. & S. F. Co. vs. Ballard,* 108 Fed. (2d) 768. In this regard they bring into this appeal the so-called conflicting positions on the proposed Bricker Amendment to the Constitution of the United States as taken by the distinguished Secretary of State, John Foster Dulles. For what reason appellant is not able to discern, unless it is attempted to indicate that the Fifth Circuit in the *Ballard* case blew hot and cold on two separate occasions.

Still dealing with Appellant's Specification of Error No. 4, counsel for appellee, on page 22 of Appellee's Brief, uses this language:

> "Special findings were neither requested by either party, nor given by the Court to the jury. It is only when the employee's act is the sole cause,—when defendant's act is no part of the causation—that defendant is free from liability under the Act.
>
> "'A rule promulgated by a railroad that a train entering yard limits must protect itself is contrary to the contractual obligation of the railroad to protect its train crews, and cannot be used by the railroad as a device to escape liability for its breach of duty to use reasonable care to furnish its employees with a safe place to work, otherwise the employees assume all of the risks of their employment contrary to the 1939

amendment to the Act abolishing the doctrine of assumption of risk'

"Cato v. Atlantic and C. A. L. Ry. Co., (S. C.) 162 S. E. 239, certiorari denied; 284 U. S. 684, 52 S. St. 200, 76 L. Ed. 577."

Now witness this portion of the opinion in the *Cato* case:

"O. C. Cato was employed by the appellants as a car repairer, under the supervision and control of R. W. Watson, general foreman of appellants' yards at Hayne Junction, and on December 6, 1926, was ordered by appellants to proceed to track No. 10, and repair the drawhead of a baggage car which had two days before been placed on that track. Cato was informed that the drawhead of the car must be repaired so it could be taken to the car repair shop of the Southern Railway Company, about one and a half miles from Hayne Junction, in Spartanburg county, for general repairs.

"It was necessary for Cato to go underneath the baggage car to perform his duties and, while there engaged in repairing the car, a switch engine backed into a cut of cars coupled to the baggage car, underneath which Cato was working, causing the wheels of the baggage car to pass over his body, horribly mutilating him, subsequently causing his death. Appellants failed to protect Cato and the other men working upon the said baggage car with a blue flag, as required by the agreement entered into between the Southern Railway Company, and others, and the Brotherhood of Railway Carmen of America, and oth-

ers, effective March 1, 1926, which superseded all other rules and agreements up to that date, copy of which agreement was delivered to Cato by the railway company, and under the guidance of which he performed his duties as a car repairer for the appellants, and upon which he relied for protection while repairing the baggage car upon the said track. The agreements upon which the action is based provides, among other things:

"'55. *Employees Required to Work Under Locomotives and Cars.*—No employee will be required to work under a locomotive or car without being protected by proper signals. Where the nature of the work to be done requires it, locomotives or cars will be placed over a pit, if available.'

"'158. Trains or cars, while being inspected or worked on by train-yard men, will be protected by a blue flag by day and a blue light by night, which will not be removed except by men who place them.'

"'163. Carmen Sent Out on Road to Perform Work.—When necessary to repair cars on the road or away from the shops, carmen will be sent out to perform such work. Two carmen, or one carman and an experienced helper, will be sent to perform such work as putting in couplers, draft rod, draft timbers, arch bars, truss rods, and wheels and work of similar character.'

"'175. *Miscellaneous.*—Except as provided for under the special rules of each craft, the general rules shall govern in all cases.'"

The *Cato* case was decided by the Supreme Court

of South Carolina on September 10, 1931. If appellee is quoting from the *Cato* case, as appears to be the fact on pages 22 and 23 of the Brief, how could the Supreme Court of South Carolina in 1931 be dealing with the 1939 Amendment to the Federal Employers' Liability Act?

ANSWER TO SPECIFICATION OF ERROR NO. 5

(Appelee's Brief, p. 23)

Appellant has heretofore answered this answer to specification of Error No. 5.

ANSWER TO SPECIFICATION OF ERROR NO. 6

(Appellee's Brief, p. 23)

Appellee recites that the case of *Southern Railway Company vs. Craig, supra,* is sufficient answer to appellant's specification of Error No. 6.

Appellant has heretofore discussed the *Craig* case.

ANSWER TO SPECIFICATION OF ERROR NO. 7

(Appellee's Brief, p. 24)

Resisting this specification of error, which dealt with the admission of expert testimony offered by

appellee over appellant's objection, as to the interpretation of operating rules, counsel for appellee states:

> "The law has been decided against appellant in the case of Haines v. Reading, (3rd Cir.) 178 Fed. (2d) 918."

This is a brief *per curiam* opinion; appellant sets it forth:

> "This is a civil action brought under the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51 et seq., by a railroad conductor who was injured in the course of the shifting of freight cars in a classification yard of the defendant. The plaintiff recovered a verdict. Judgment was entered thereon and the defendant has appealed. The defendant asserts that the trial judge erred in admitting in evidence certain of its rules relating to the use of air brakes and the placing of materials on top of cars and in permitting the jury to base its verdict on the alleged violation of these rules. We see no merit in this contention. The rules in question were identified and explained as applicable to the facts of the case by a witness, a retired employee of the defendant, whose 37 years experience as fireman, brakeman, conductor, assistant yardmaster, yardmaster, general yardmaster and assistant trainmaster obviously qualified him as an expert. Although two employees of the defendant testified that these rules were not applicable, an issue of fact with respect thereto was raised which the trial judge rightly submitted to the jury. The jury was justified in finding from the evidence

> that the defendant's failure to comply with the rules in question constituted negligence on its part which was the proximate cause of the plaintiff's injuries. There is, therefore, no merit in the defendant's contention that there was no evidence to support the verdict."

A second reason assigned against this specification of error on the part of appellant is the statement in Appellee's Brief, page 24, that the Court:

> "offered to instruct the jury to disregard the expert testimony given in the case, but counsel for both parties refused the Court's offer, and thereby each of the parties waived any error that could possibly arise from the introduction of the expert testimony. The Court in its order denying appellant a new trial, or a judgment n.o.v., said:
>
> " 'However, it is not necessary for the Court to pass on this question, because the propriety of the testimony was waived by counsel for both parties when they refused the Court's offer to instruct the jury to disregard this portion of the testimony.' (R. 32-33.)
>
> "As will be noticed from the order the testimony referred to was the testimony of the expert witnesses."

This was a gratuitous assertion made by the trial Court in denying the motion of appellant for judgment n.o.v. or in the alternative for a new trial. There is not a syllable of evidence in the printed record

apart from the Court's order that appellant *refused* the offer of the Court to withdraw this evidence; the fact remains that it is in the record over appellant's objection, and if the Court at some stage of the proceedings reached the conclusion that the objection was well taken, then, of its own motion, the Court should have withdrawn the evidence from jury consideration.

CONCLUSION

(Appellee's Brief, p. 25)

Under this heading it is said:

> "There being no conflict in the evidence as to the negligence of the train dispatcher, under the conditions shown in the record, in failing to notify each crew of the presence of the other train, the Court, if the verdict had gone agaist the plaintiff, would have been justified in granting her a new trial."

Appellant asserts that we have here now a tacit admission by appellee that the only actionable negligence on the part of the appellant was the failure of the dispatcher at East Lewiston to have notified the crew members of 6015 and 1648 as to the whereabouts of each other.

This Honorable Court, from a study of the Transcript of the Record should reach but one conclusion,

viz: that appellee was relying for a recovery on the trial amendment which charged a violation of Rules 99, 101 and 108. In this respect reference is made to the calling of the expert Myhre. Negligence in this respect has now been abandoned. In short, appellee now asserts that the cause of Engineer Mely's death was the alleged negligence of the dispatcher at East Lewiston as hereinbefore referred to. The entire record indicates that this was but an afterthought on the part of appellee.

It is respectfully submitted that the sole and efficient cause of the engineer's death was his violation of Rule 93.

In the alternative, appellant asserts that a new trial should be granted.

Respectfully submitted,

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